



(10)

APR 28 1946

CHARLES ELMORE CROSFLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 874

FRANK ANDREWS,

Petitioner,

vs.

STATE OF OHIO,

Respondent

PETITION FOR REHEARING

SOL GOODMAN,
WM. F. HOPKINS,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 874

FRANK ANDREWS,

vs.

STATE OF OHIO,

Petitioner,

Respondent

PETITION FOR REHEARING

Comes now petitioner and respectfully requests a rehearing in the herein cause on the grounds that the decision of the State court is discriminatory in that it has imposed a penalty upon petitioner for the doing of an act which under another statute is legalized when performed by other persons.

Petitioner in his petition for rehearing directs the Court's attention to the fact that he had not had the opportunity to reply to the brief filed by the State of Ohio in opposition to his petition for a writ of certiorari, and that said brief sets forth arguments and contentions which are wholly untenable.

The brief of respondent heretofore filed in this case cites authorities apparently sustaining its contention (page 8) that the Fourteenth Amendment to the federal Constitution

- (a) permits a State under its police power to discriminate between persons in its statutory enactments and

- (b) that a State is permitted to classify and discriminate between persons in the enactment of penal statutes and
- (c) that the Fourteenth Amendment to the Federal Constitution in no way limits the police power of a State.

Petitioner contends that each of the three propositions of law are wrong and if given the opportunity on rehearing he would demonstrate said propositions of law to be erroneous.

See *Hillsborough Township v. Cromwell*, 90 S. Ct. L. Ed., page 301:

The equal protection clause of the *Fourteenth Amendment protects the individual from state action which selects him out for discriminatory treatment* by subjecting him to taxes not imposed on others of the same class. *The right is the right to equal treatment.*

Certainly, if this is true as to taxes, it applies with equal force to the personal liberties of the individual.

Article XIV, Section 1 of the Federal Constitution provides that "no State shall make or enforce laws which shall * * * denying to any person within its jurisdiction the equal protection of the law." In the present case the State of Ohio has enacted simultaneously Section 13064 of its Code which permits the operation of a *scheme of chance* if it is not done for one's own benefit and under Section 13064-1 makes it a penal offense to operate a *scheme of chance*. By the enactment of these two laws it further permits gambling for charitable purposes and such but penalizes gambling for profit. The prosecuting attorney has the choice of selecting under which Section a prosecution is to be instituted and in that manner he is effectively prosecuting one person and exempting from prosecution an-

other. Thus the law lays in unequal hands on different persons, such as is forbidden by the Federal Constitution. For an interesting historical background of the Sections of the Code involved in this case, we direct your attention to the decision in *State v. Simonian*, 77 Ohio Appellate Reports, where at page 212 it is stated:

In the case of Section 13064, General Code, therefore, since the Legislature has provided no penalty for one who conducts a lottery or scheme of chance, where such lottery or scheme is not conducted for such person's 'own benefit' although the constitutional prohibition still remains, it is obvious that no criminal prosecution may be predicated upon such conduct, under such circumstances.

We also direct the court's attention to the decision in the case of *Hague v. Committee for Industrial Organization*, 307 U. S., wherein this Court held that the equal protection of the law provision is violated if public officials fail systematically to enforce the law equally against all members of a class affected by it.

In the case of *Fowler v. State*, 189 Ga. 733, that court stated that due process under the Fourteenth Amendment requires a State to frame its crime statutes so that those to whom they are addressed may know what standard of conduct it intends to be required. Under the statutes above referred to the defendant in this case certainly did not know that in order to avoid a prosecution he had to select a charity and turn over the profits of the operation to it.

This Court in the case of *Buchalter v. New York*, 319, U. S. 427, announced the rule that the due process clause of the Constitution required that action by a State must be consistent with fundamental principles of liberty and justice which lie at the base of our civil and political institutions.

Going back for centuries in the history of common law as well as the law of our State and land a statute on defining

a criminal act has never undertaken to exempt some persons or groups from the application of the law to them. Theft has always been defined as the stealing and taking of property of another. The law has never condoned the acts of Robin Hood who has taken the property of the other for the benefit of the poor. Ohio in the present case seeks to set up just such a law which provides that if any one operates a scheme of chance for the benefit of the poor it is no crime, but if in the mind of the prosecuting officials the poor did not get such benefit, then he may be prosecuted.

We respectfully submit that the millions of citizens of the State of Ohio are entitled to have the opinion of this Honorable Court as to whether or not such a novel policy of the legislature can be sustained.

In the case above referred to by the Court of Appeals of Ohio, 77 Ohio App. at page 208, you will see that from the days of the Ordinances of 1787 to the final adoption of the Statutes involved in this case in 1943, throughout the history of the State of Ohio, there has never been enacted law which permitted the operation of a scheme of chance, if not done for one's own benefit.

Petitioner and his counsel represent that this petition for rehearing is not being made for the purpose of delay, and that it is directed to the discretion and attention of the court to the end that the court might reconsider its order therein wherein it denied his petition, and grant this petitioner a rehearing so that the decision of the State courts may be properly reviewed and finally reversed.

SOL GOODMAN,
WM. F. HOPKINS,
Counsel for Petitioner.

